Is There A Danger the Emerging International Courts Will Be Politicized? Lessons from the International Court of Justice

*By Malvina Halberstam**

For centuries, international law regulated relations between states.[1] With rare exception, it did not create rights for individuals, nor impose responsibilities on individuals.[2] That has changed dramatically in the last few decades. The adoption of the Genocide Convention in 1948,[3] the Geneva Conventions in 1949,[4] several human rights conventions in the 1960s, such as the Covenant on Civil and Political Rights,[5] and treaties focusing on specific aspects of terrorism,[6] from airplane hijacking[7] to transportation of nuclear material,[8] have resulted in the creation of a significant body of substantive international law giving individuals rights—even against their own government—and holding individuals responsible for their acts.

There were, however, few mechanisms for implementing this body of law. There were few international courts in which one who claimed his rights had been violated could seek redress and none in which one who was responsible for even the gross violation of such rights could be tried.[9] Thus, the establishment of international tribunals to try and punish those responsible for unspeakable atrocities is a major development in international law and one to be applauded.

Yet, I have serious reservations about the Rome Statute establishing the International Criminal Court (ICC). It was adopted through a highly politicized process, which created a treaty with a number of flaws. I oppose some of its provisions on policy grounds—such as the provision that could be interpreted to mean that any Jew who lives in Jerusalem is guilty of a war crime and could be tried as a war criminal by the Court.[10] I believe other provisions make it impossible for the U.S. to ratify the Rome Statute consistent with the U.S. Constitution. For example, the United States ratified the Genocide Convention with a reservation,[11] necessary because prohibiting incitement to genocide, as required by the Convention, is not compatible with the First Amendment, as interpreted by the U.S. Supreme Court.[12] A similar reservation cannot be made with respect to the Rome Statute, which incorporates the Genocide Convention, because the Rome Statute does not permit reservations.[13] I have discussed some of these problems elsewhere and will not discuss them further here.[14]

Rather, I would like to focus on the question whether there is reason for concern that the adjudicating process itself may be politicized. Since the ICC is relatively new, it might be instructive to look at the decisions of the International Court of Justice (ICJ). At least two high-profile ICJ cases decided in recent years give reason for such concern: the decision in *Nicaragua v. United States*[15] and the Advisory Opinion on the Israeli security fence.[16]

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In *Nicaragua v United States*,[17] it was undisputed that Nicaragua had not filed a declaration accepting the compulsory jurisdiction of the ICJ. Rather, jurisdiction was claimed based on Art 36(5) of the ICJ statute, which provides:

> Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statue, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.[18]

Nicaragua signed the Protocol of Signature of the Statute of the Permanent Court of International Justice (PCIJ), and made a declaration recognizing the compulsory jurisdiction of the PCIJ in 1929. However, "that Protocol provided that it was subject to ratification, and that instruments of ratification were to be sent to the Secretary-General of the League of Nations."[19] In November 1939, some 10 years later, the Ministry of External Relations sent a telegram to the Secretary—General of the League of Nations that the Statute and the Protocol "have already been ratified" and that they "[w]ill send… in due course the instrument of ratification."[20]

No instrument of ratification was ever received, however. Nor was there evidence—or even a claim by Nicaragua—that an instrument of ratification had in fact been sent. This, despite the fact that, as stated by the Court in its decision, "on 16 December 1942, the Acting Legal Adviser of the Secretariat of the League of Nations wrote to the Foreign Minister of Nicaragua to point out that he had not received the instrument of ratification the *deposit of which is necessary to cause the obligation to come into effective existence.*"[21] The Nicaraguan Memorial acknowledged that "Nicaragua never completed ratification of the optional Protocol of Signature" and at the hearings on the case the Agent for Nicaragua explained that "the records are very scanty," and he was therefore "unable to certify the facts one way or the other."[22]

A report of the PCIJ covering 1939-1945 listed Nicaragua among the states that signed the optional protocol, but noted that Nicaragua had not ratified the Protocol of the Signature of the Statute.[23] Yearbooks of the ICJ included Nicaragua on the list of states bound by the compulsory jurisdiction provision of the ICJ but noted that it was based on a declaration under the PCIJ, and that the instrument of ratification was never received.[24] Other UN documents emanating from the Court and from the Secretary-General also listed Nicaragua as being subject to the compulsory jurisdiction provision.[25]

Although the Court acknowledged that consent to jurisdiction had to be expressed by "the deposit of the acceptance with the Secretary-General,"[26] it nevertheless determined that Nicaragua must be viewed as having accepted compulsory jurisdiction. The Court said:

> If the Court were to object that Nicaragua ought to have made declaration under Article 36, paragraph 2, it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary-General of the United Nations and, in sum, having (on account of the authority of their sponsors) regarded them as more reliable than they really were.[27]

In other words, because documents issued by the Court and by the Secretary-General erroneously listed Nicaragua as having ratified the Protocol, it must be deemed to have ratified it. And this, even though those same documents included a caveat that Nicaragua's inclusion in the list was based on its ratification of the PCIJ but that its ratification of that instrument was never received.[28] Evidence submitted by the U.S. that in 1943 and again in 1955-58, when the question of an action *against* Nicaragua came up, Nicaragua had indicated to the United States that it had not consented to the compulsory jurisdiction of the ICJ, was dismissed by the Court as not "sufficient to overturn our conclusion."[29]

This is problematic. As the Court itself said:

> But Nicaragua has not been able to prove that it accomplished the indispensable step of sending its instrument of ratification to the Secretary-General of the League of Nations. It did announce that the instrument would be sent; but there is no evidence to show whether it was. Even after having been duly informed, by the Acting Legal Adviser of the League of Nations Secretariat, of the consequences that this might have upon its position vis-à-vis the jurisdiction of the Permanent Court, Nicaragua failed to take the one step that would have easily enabled it to be counted beyond question as one of the States that had recognized the compulsory jurisdiction of the Permanent Court of International Justice. Nicaragua has in effect admitted as much.
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> The Court therefore notes that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, *was not a party to that treaty*.[30]

Yet, the Court held that it had jurisdiction.[31] Did it do so for political reasons, i.e. because it thought it important to deal will the issues raised by the case? To ultimately hold that the United States' use of force was a violation of article 51[32] (which itself involves a very problematic interpretation of article 51)?[33] Or can the decision be explained by the different jurisprudential backgrounds of the judges?

To me, it appears that the Court is finding jurisdiction where there is none, because it wants to decide a high-profile political case. If, as the Court concluded, Nicaragua did not ratify the PCIJ Protocol, there was no basis in the ICJ Statute for an action by Nicaragua against the U.S. without U.S. consent. There is nothing in the ICJ Statute authorizing the Court to assert jurisdiction as a means of atonement for its and the Secretary-General's errors. But, perhaps, the decision can be explained as reflecting a different legal philosophy, rather than as being politically motivated.

If there is room for even the slightest doubt in the *Nicaragua* case that the decision was politically motivated, there can be none, in my view, in the Israeli security fence case. The Court asserted jurisdiction to grant an Advisory Opinion even though the question involved a matter in dispute between states,[34] which would have brought the matter within the Court's contentious jurisdiction,[35] but only if Israel consented.[36] The Court rejected the argument that it did not have advisory jurisdiction "because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction."[37] It stated that "the lack of consent to the Court's contentious jurisdiction by interested states has no bearing on the Court's jurisdiction to give an advisory opinion."[38] Quoting from an earlier decision, it went on to explain:

> The consent of States, parties to dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the request for an opinion relates to a legal question actually pending between States. *The Court's reply is only of an advisory character; as such, it has no binding force*.[39]

The implication seems to be that the difference between contentious jurisdiction and advisory jurisdiction turns *not* on whether the question concerns a matter that is in dispute between states, but on the *effect* to be given to the answer: if the jurisdiction is contentious the Court's decision is binding; if the jurisdiction is advisory, the decision "has no binding force."[40] Aside from the fact that this would permit the Court to assert jurisdiction in every dispute between states, regardless of their consent, circumventing the limitation on the Court's jurisdiction that the consent requirement was designed to impose,[41] the Court seems to have disregarded its own distinction in this case. In its final paragraphs and in its conclusion the Court repeatedly states that Israel is "under a legal *obligation* to" do various things,[42] and that "all states are under an *obligation*" to do various things to ensure Israeli compliance.[43] Clearly, if Israel and other states are legally obligated to take actions as specified in the decision, it has "binding force." Decisions without binding force do not impose legal obligations.

Further, the General Assembly clearly did not need the Court's advice on a legal issue—the basis for the Court's advisory jurisdiction[44]—since it had already adopted a resolution denouncing Israel's construction of the fence as illegal,[45] the very question on which it was asking the Court for an advisory opinion. But the most egregious action—apart from the decision that Israel had no right to self-defense with regard to the terrorist acts against it[46]—may well have been the refusal to recuse a judge who had repeatedly spoken on the matter.[47]

Nabil Elaraby, the Egyptian judge, had made many speeches while Egyptian ambassador to the UN attacking Israeli policy, and played a leading role in the Tenth Emergency Special Session of the UN GA, from which the advisory opinion request emerged. In a newspaper interview after his ambassadorship (quoted by judge Buergenthal in his dissent), he referred to "the atrocities perpetrated [by Israel] on Palestinian civilian populations," and its "grave violations of humanitarian law."[48] Continuing, he criticized the Palestinians and Arab states for their failure to assert that Israel is occupying Palestinian territory in violation of international law. "I hate to say it," Elaraby was quoted in the article as saying, "but you do not see the Palestinians or any other Arab country today, presenting the issue thus when addressing the international community; 'Israel

is occupying Palestinian territory and the occupation itself is against international law...'"[49]

Still, the Court rejected the request that Judge Elaraby be recused.[50] It took the position that statements made in his capacity as a representative of Egypt, rather than in his individual capacity, could not be considered; that the Tenth Emergency Special Session made the request for the Advisory Opinion after Judge Elaraby "had ceased to participate in that session as representative of Egypt;" and that "in the newspaper interview… Judge Elaraby expressed no opinion on the question put in the present case."[51]

Only Judge Buergenthal dissented. He said:

> It is technically true, of course, that Judge Elaraby did not express an opinion on the specific question that has been submitted to the Court by the General Assembly of the United Nations. But it is equally true that this question cannot be examined by the Court without taking account of the context of the Israeli/Palestinian conflict and the arguments that will have to be advanced by the interested parties in examining 'The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory.' Many of these arguments will turn on the factual validity and credibility of assertions bearing directly on the specific question referred to the Court in this advisory opinion request. And when it comes to the validity and credibility of these arguments, what Judge Elaraby has to say in the part of the interview…, creates an appearance of bias that in my opinion requires the Court to preclude Judge Elaraby's participation in these proceedings. [52]

It is a fundamental principle of justice that a judge be and appear to be impartial.[53] In the U.S., candidates for judicial appointment generally refuse to answer questions on issues that may come before them as judges, lest they be seen as having prejudged the matter. In the U.K., the House of Lords set aside a judgment in the *Pinochet* case because one of the judges was active in a charitable organization that was wholly controlled by Amnesty International, which had intervened in the appeal of the case.[54] By contrast, the Court that decided that Israel's construction of a barrier to keep out suicide bombers was illegal included a judge who repeatedly attacked Israel in his capacity as Egyptian ambassador to the UN, and in an interview given after his tenure as ambassador urged the Palestinians and other Arab states to make the argument that "Israel is occupying Palestinian territory, and the occupation itself is against international law," a highly controversial and complex legal question on which the Court had never ruled, but on which the answer to the question posed by the GA request for an advisory opinion would depend.[55] Yet, he did not recuse himself, and Israel's motion to recuse was rejected by the Court.

Space constraints do not permit a detailed analysis of the Court's decision in each of these cases. It should be noted, however, that in both cases, the Court created new rules of substantive law that enabled it to reach its results. In the *Nicaragua* case, the Court added two new requirements to the Charter provision for collective self-defense: (1) the state attacked must first *declare* itself to be a victim of an attack,[56] and (2) it must *request* the assistance of the state coming to its aid.[57] In the Israeli security fence case, the Court limited "the inherent right to self-defense," enshrined in Article 51 of the Charter,[58] to attacks by *states*. It held that there is no right to self defense to attacks by entities that are not states.[59] There is nothing either in the language or history of Article 51 to support these limitations and the Court cited no authority for its interpretation of article 51 in either case.[60]

There are many objective, principled decisions by the ICJ, made by judges who do not have a preconceived view of the matter. But, not all are. As the number of international courts increase and cases that may have important political implication are brought before them, great care must be taken to ensure that a Court not exercise jurisdiction beyond that conferred by the treaty establishing it, that it not reinterpret established legal principles to reach a particular result, and that judges who have previously expressed views on a question to be decided in a case not sit on the court that decides that case.

A legal system based on fair and just principles of law, objectively interpreted and applied by courts composed of judges who are fair, unbiased, and without preconceived views of the case, would be a great achievement at any level, especially at the international level, to be encouraged and supported. But, the opposite is also true. A system whose principles are not fair and just, or that permits judges who have expressed a preconceived opinion of a case to sit on the court that decides that case, is a perversion of justice to be condemned. Let us hope that the ICC and the other emerging international tribunals will be in the former category, not the latter.

Endnotes

1 *See* Louis B. Sohn & Thomas Buergenthal, International Protection of Human Rights 1-8 (1973).

2 Piracy is an example.

3 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [*hereinafter* Genocide Convention].

4 Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 1351; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention of 1949].

5 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

6 *See* Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 UNTS 219; Convention for the Suppression of the Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against the Capture of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. Treaty Doc. 100-19, 1589 U.N.T.S. 484; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304, *reprinted in* 27 I.L.M. 685 (1988); International

Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, 116 Stat. 721, 37 I.L.M. 249; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 116 Stat. 724, 39 I.L.M. 270; The adoption of a Comprehensive Convention on Terrorism, proposed by the General Assembly, has been stalled in committee for several years because the Organization of the Islamic Conference ("IOC") has insisted on an exemption for "national liberation movements." *See* Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, U. N. GAOR 61st Sess., Supp. No. 37, U.N. Doc. A/61/37 (Feb. 27, 2006). Such an exemption would effectively vitiate the convention. *See* Malvina Halbertam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whoever Committed*, 41 Colum. J. Transnat'l L. 573 (2003).

7 *See, e.g.* Convention for the Suppression of the Unlawful Seizure of Aircraft, *supra* note 6.

8 *See, e.g.* Convention on the Physical Protection of Nuclear Material, *supra* note 6.

9 The Genocide Convention provides for the establishment of a special tribunal but none was ever established. *See* Genocide Convention, *supra* note 3, art. 6 ("Persons charged with genocide or any of the other acts enumerated in article III shall be tried by… such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.").

10 See Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 3 [*hereinafter* Rome Statute].

11 The Senate Resolution giving advice and consent to ratification of the Genocide Convention included a reservation that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." *See* 130 CONG. REC. S14,076 (daily ed. Oct. 11, 1984). The United States ratified the convention Nov. 25, 1988 and it entered into force for the United States on February 23, 1989. *See* U.S. Dept. of State, Treaties in Force 432-435 (2006), *available at* http://www.state.gov/documents/organization/65521.pdf.

12 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech may only be prohibited if it is "directed at inciting or producing imminent lawless action" and it is "likely to incite or produce such action."); Schenck v. United States, 249 U.S. 47 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.") (emphasis added).

13 Rome Statute *supra* note 10, art. 120 ("No reservations may be made to this Statute.").

14 *See* AALS Panel Discussion on the International Criminal Court, 36 Am. Cr. L. Rev. 231, (1999)(statement by Malvina Halberstam).

15 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14 (June 27) (decision on the merits) [hereinafter Nicaragua v. United States decision on the merits]; 1984 I.C.J. 392 (Nov. 26) (jurisdiction of the court and admissibility of the application) [*hereinafter* Nicaragua v. United States decision on jurisdiction]

16 Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9), *reprinted in* 43 I.L.M. 1009 [*hereinafter* Legal Consequences of the Wall].

17 Nicaragua v. United States decision on jurisdiction, *supra* note 15.

18 Statute of the International Court of Justice art. 36(5), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute]. Technically the Statute of the I.C.J. is not a separate treaty, but part of the U.N. Charter. See U.N. CHARTER art. 92.

19 Nicaragua v. United States decision on jurisdiction, *supra* note 15, ¶15, at 399.

20 *Id.* ¶ 16, at 399-400.

21 *Id.* (emphasis added).

22 *Id.*

23 *Id.* ¶ 19, at 401.

24 *Id.*

25 *Id.* ¶ 20, at 401.

26 *Id.* ¶ 45, at 412.

27 *Id.* ¶ 46, at 412.

28 *Id.*

29 *Id.* ¶¶ 49-50, at 413-14.

30 *Id.* ¶¶ 25-26, at 404 (emphasis added).

31 *Id.* ¶ 109, at 441.

32 *See* Nicaragua v. United States decision on the merits, ¶ 235, at 121-22.

33 *See* text at notes 57-58 *infra.*

34 *See* I.C.J. Statute, *supra* note 18, art. 34(1) ("Only states may be parties in cases before the Court.").

35 *Id.* art. 36(2) ("The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court...").

36 *Id.*

37 Legal Consequences of the Wall, *supra* note 16, ¶ 46, at 152-53.

38 *Id.* para. 47, at 157-58.

39 *Id.* (emphasis added).

40 *Id.*

41 *Id.* ¶ 50, at 159.

42 *Id.* ¶ 145, at 196; ¶ 143, at 195 ("Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above)…. ").

43 *Id.* ¶ 146, at 196-97; ¶ 159, at 200.

44 I.C.J. Statute, *supra* note 18, art. 65(1) ("The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.").

45 G.A. Res. 10/13, ¶ 1, U.N. Doc. A/RES/ES-10/13 (Oct. 21, 2003) ("*Demands* that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law.")

46 *See* Legal Consequences of the Wall, *supra* note 16, ¶ 139, at 194. The Court took the position that the right to self-defense only applies to attacks that emanate from another state and that since the Palestinian Authority was not a state Article 51 of the UN Charter did not apply. Judge Higgins disagreed with the Court on this point. She stated

> In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." *There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State*….
>
> I also find unpersuasive the Court's contention that, as the uses of force emanate from occupied territory, it is not an armed attack "by one State against another." *I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory*—a territory which it has found not to have been annexed and is certainly "other than" Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.

Id. ¶¶ 33-4, at 215 (separate opinion of Judge Higgins) (emphasis added).

47 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 3, ¶ 8, at 7 (Jan. 30) (request for an Advisory Opinion Order of Jan. 30) [*hereinafter* Order of Jan. 30 on the Legal Consequences of the Wall].

48 *Id.* ¶ 8, at 8 (dissenting opinion of Judge Buergenthal, *quoting* Aziza Sami, *Nabil Elaraby: A law for all nations*, Al-Ahram Weekly (Cairo), Aug. 16-22, 2001, *available at* http://weekly.ahram.org.eg/2001/547/profile.htm).

49 *Id.*

50 See *supra* note 47.

51 Id. ¶ 8, at 5-6.

52 *Id.* ¶ 13, at 9-10.

53 It is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Rex v. Sussex, Justices, *Ex parte* McCarthy [1924] 1 K.B. 256, 259 (Lord Hewart, C.J.).

54 R. v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2), [2000] 1 A.C. 119, 137 (H.L.) (appeal taken from Eng.) (U.K.) ("in my judgment, the relationship between A.I. [Amnesty International], A.I.C.L. [Amnesty International Charity Ltd.] and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal… ").

55 *See* Opinion Order of Jan. 30 on the Legal Consequences of the Wall, *supra* note 47, ¶ 8, at 8.

56 *See* Nicaragua v. United States decision on the merits, *supra* note 15, ¶195, at 104 ("Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the *victim* of an armed attack.") (emphasis added).

57 *Id.* ¶196, at 105 ("The Court concludes that the requirement of a *request by the State which is the victim* of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.") (emphasis added).

58 U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence…").

59 *See* Legal Consequences of the Wall, *supra* note 16, ¶139, at 194 ("Israel does not claim that the attacks against it are imputable to a foreign State…. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory."). *See also*, Separate Opinion of Judge Higgins, quoted *supra* note 46.

60 For a discussion of the history of Article 51, *see* Malvina Halberstam, *The Right to Self-Defense once the Security Council Takes Action*, 17 Mich. J. Int'l L. 229 (1996).